

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP211

Cir. Ct. No. 2007TP44

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO
SIMIONE M., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TERRY L. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
GLENN H. YAMAHIRO, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Terry L. M. appeals the order terminating his parental rights to his son, Simone M. Terry contends that he is entitled to a new

¹ This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(e) (2005-06).

dispositional hearing because the trial court erroneously exercised its discretion by terminating his parental rights without addressing all of the factors enumerated in WIS. STAT. § 48.426(3) (2005-06).² Because the record reflects that a preponderance of the evidence supports the trial court's order, this court affirms.

I. BACKGROUND.

¶2 Simione was born on July 16, 1996, and is the marital child of Terry and Ada M. He has five siblings. In October 2002, Terry brought Simione and two of his siblings into an office affiliated with the Milwaukee Bureau of Child Welfare (Bureau). At that time, Terry told a staff member that he did not have proper housing for his children and that he needed assistance. On June 6, 2003, Simione was found to be a child in need of protective services (CHIPS) and was placed outside of Terry's home.

¶3 Terry was granted visitation rights to Simione. However, they were suspended due to his failure to appear at the visitations. He expressed a desire to restart his visitations, but would not guarantee that he would attend them. The Bureau was hesitant to restart the visitations because of how upset Simione was when his father would not show up. Additionally, through discussions with his case worker, Simione did not appear to want to restart the visits.

¶4 In May 2006, Simione was placed with a foster family. He fit in with the family and immediately began referring to the foster parents as "mom" and "dad." Behavioral issues that Simione had been prone to at home and school

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

began to disappear once he was placed with the foster family. He received and continues to receive treatment from a therapist, and he has no ongoing medical conditions.

¶5 The foster family allowed Simone to stay in contact with his biological relatives at his discretion. He chose to remain in contact with several of his siblings, but beyond inquiring into Terry's well-being, he did not express a desire to make contact or rebuild a relationship with his father. Simone had Terry's phone number and his foster family encouraged him to call, but he chose not to do so.

¶6 On February 22, 2007, the State filed a petition for the termination of Terry's parental rights to Simone, alleging abandonment as grounds for termination pursuant to WIS. STAT. § 48.415(1)(a)2.³ The petition was filed when Terry did not visit Simone or contact Simone by telephone or have any written or electronic contact with him for more than three months while he was placed outside of Terry's home.

¶7 The foster family desires to adopt Simone, and at the time of the dispositional hearing, had nearly completed the adoption licensing process. Simone made it known that he is very excited by the prospect of being adopted by the foster family and that he wanted it to be done by the end of the summer of 2007.

³ The petition sought to terminate the parental rights of both Terry and Simone's mother. Only the termination of Terry's parental rights are at issue in this appeal, and proceedings involving Simone's mother will therefore not be addressed.

¶8 On October 3, 2007, at a dispositional hearing at which Terry failed to appear, the trial court found him in default and determined that there were sufficient grounds to terminate his parental rights. Simone's guardian ad litem was present and stated that the termination was in his best interests. The court found that it was in the best interest of Simone to be placed in the custody of the Bureau for the purpose of adoption by the foster family. The trial court stated:

Based on the record in this case, I find the State has met its burden by clear and convincing evidence. There are grounds here for termination based upon the documents which the court has taken judicial notice in addition to the testimony of [the Bureau case worker assigned to Simone's case]. And in particular I do find that there has been abandonment within the statutory definition as to both parents. So I think it's clear on this record that grounds do exist to the level required under the statute.

... And based upon that I do find as a disposition that it is in the best interest of Simone to have the rights of his parents terminated at this time, also based on the willing and adoptive resource available and even more importantly based upon Simone's desire to achieve permanency through an adoption with the [foster] family.

So I do find that the State has established that his two birth parents are unfit by virtue of abandonment, and that the disposition [that] is in his best interest according to the statute and all the other factors is TPR and adoption.

¶9 A written order terminating Terry's parental rights was filed. Terry then filed a motion for reconsideration, which the trial court denied. This appeal follows.

II. ANALYSIS.

¶10 Whether circumstances warrant termination of parental rights is within the trial court's discretion. *David S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993). Therefore, when reviewing a trial court's decision to grant

a default judgment to terminate a person's parental rights, this court must analyze the decision under an erroneous exercise of discretion standard. *Id.* This court will review the record “to determine if the [trial] court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach.” *Brandon Apparel Group, Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, ¶10, 247 Wis. 2d 521, 634 N.W.2d 544. Specifically, when analyzing the termination of parental rights, the court must look to see if the trial court made its finding on the record, gave consideration to the factors enumerated in WIS. STAT. § 48.426(3) using a best interests of the child standard, and explained the basis for its disposition. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶¶29-30, 255 Wis. 2d 170, 648 N.W.2d 402.

¶11 Terry argues that the trial court erroneously exercised its discretion when it terminated his parental rights without specifically addressing three of the six factors listed in WIS. STAT. § 48.426(3). According to § 48.426(3), a trial court shall consider, but is not limited to considering, the six factors specified as follows:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

Sec. 48.426(3)(a)-(f).

¶12 Terry argues that the trial court never addressed Simione's age and health; whether Simione has a substantial relationship with family members and whether it would be harmful to sever those relationships; and the duration of the separation between Simione and Terry. WIS. STAT. § 48.426(3)(b)-(c), (e). He argues that pursuant to *State v. Margaret H.*, 2000 WI 42, ¶¶38-39, 234 Wis. 2d 606, 610 N.W.2d 475, this court must remand to the trial court for a new dispositional hearing if the trial court failed to evaluate all of the § 48.426(3) factors on the record.

¶13 Contrary to Terry's contention, *Margaret H.* does not make remand for a new dispositional hearing the exclusive option for an appellate court when inadequate findings are presented. Four additional options are given, including: "1) look[ing] to an available memorandum for findings and conclusions; 2) review[ing] the record anew and affirm[ing] if a preponderance of evidence clearly supports the judgment; 3) revers[ing] if the judgment is not so supported; or 4) remand[ing] for further findings and conclusions." *Margaret H.*, 234 Wis. 2d 606, ¶37.

¶14 Terry argues that even with these other options available, *Margaret H.* stated a preference for a remand for further findings and conclusions in family law cases when there are inadequate findings of fact, so that the appellate court does not "curtail the [trial] court's discretion in this matter and substitute [its] judgment." *Id.*, ¶38. He points to the Wisconsin Supreme Court's

statement in *Margaret H.* that a review of the record “is seldom adequate to render factual determinations that lie squarely within the province of the [trial] court.” *Id.*

¶15 In *Margaret H.*, the supreme court held that the trial court erred by evaluating the WIS. STAT. § 48.426(3) factors under the best interests of the parent, and not the child.⁴ *Margaret H.*, 234 Wis. 2d 606, ¶36. Evidence of the child’s best interests was not fully presented. *Id.*, ¶¶38-39. Here, there is no need for a new hearing to present a completely new set of evidence based on the best interests of the child, as in *Margaret H.* All the necessary evidence to come to a determination of Simone’s best interests has been presented to the court, the manner in which it was used by the court to determine its holding was simply not fully articulated.

¶16 In this case, the trial court failed to specifically address three of the six WIS. STAT. § 48.426(3) factors in its holding. The trial court mentioned, however, that the basis of its holding was the record in general, the CHIPS dispositional orders and portions of the petition for termination of parental rights, which the court took judicial notice of, and the testimony of the Bureau case worker assigned to Simone’s case. Therefore, because the trial court articulated that these items were used to reach its determination, this court will “independently review the record to determine whether it provides a basis for the court’s exercise of discretion.” *State v. Mainiero*, 189 Wis. 2d 80, 95, 525 N.W.2d 304 (Ct. App. 1994).

⁴ WISCONSIN STAT. § 48.426(2) states that, “[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.”

¶17 A valid exercise of discretion requires a process of reasoning based on “facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.” *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Accordingly, this court will not look for any “magic words” recited by the trial court, *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 151, 502 N.W.2d 918 (Ct. App. 1993), but rather, reasons to sustain the trial court’s discretionary ruling through evidence contained in the record which would support the decision had the trial court fully explained its exercise of discretion, *Mainiero*, 189 Wis. 2d at 95-96.

¶18 Terry takes issue with the trial court’s consideration of three of the WIS. STAT. § 48.426(3) factors. However, a review of the record shows that evidence related to each of the three § 48.426(3) factors was thoroughly presented and supported the trial court’s decision that termination of Terry’s parental rights was in Simone’s best interest. This court will address each factor in turn.

¶19 The first WIS. STAT. § 48.426(3) factor that Terry claims was not adequately considered by the trial court, Simone’s age and health at the time of disposition and at the time of removal from Terry’s home, is thoroughly supported by the record. *See* WIS. STAT. § 48.426(3)(b). The Bureau case worker assigned to Simone’s case testified that Simone was approximately six years old when he was removed from Terry’s home and was eleven years old at the time of the dispositional hearing and has not had any ongoing medical problems. At the time Simone was removed from Terry’s home and placed into foster care, he had behavioral problems. Since moving into the foster family’s home, he has received treatment from a therapist and his behavior has improved drastically, to the point that the problems have all but disappeared. Based on the record, Simone is healthy and his behavior has improved since being removed from Terry’s home.

¶20 The record contains evidence supporting factor three of WIS. STAT. § 48.426(3), Simone's relationships with his family members and whether it would be harmful to Simone to sever those relationships, which was not articulated in the trial court's holding. *See* WIS. STAT. § 48.426(3)(c). There was testimony at the dispositional hearing that Simone has not had contact with his father since January 2006, and has not had contact with his mother since October 2006. The trial court found that both have abandoned Simone, and he stated that he did not wish to continue to have a relationship with either parent. Simone does retain a relationship with his siblings, which the foster family has encouraged him to have and allowed him to continue. Because these facts support the trial court's holding, termination of Terry's parental rights will not be detrimental to Simone's familial relationships.

¶21 Finally, the third factor Terry argues was not addressed by the trial court is the duration of separation of Simone from Terry. *See* WIS. STAT. § 48.426(3)(e). Although this factor was not expressly mentioned in the trial court's holding, it was presented to the court through the Bureau's case worker's testimony. He testified that Simone has been outside of Terry's home since October 2002. This evidence of a long separation, when looked at in conjunction with Simone's happiness with his situation and his behavioral improvement, supports the trial court's exercise of discretion.

¶22 After a review of the record, this court holds that the trial court did not erroneously exercise its discretion when it terminated Terry's parental rights because a preponderance of evidence supports the trial court's order. Therefore, the order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)4.

